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No. 85-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

S/S SALVADOR, her engines, boilers, etc.
and A/S IVARANS REDERI,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

MOTION OF AMERICAN PRESIDENT LINES, LTD. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION OF AMERICAN PRESIDENT LINES, LTD. FOR LEAVE TO FILE ANNEXED BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of the Supreme Court, American President Lines, Ltd. (hereinafter "APL") respectfully moves this Honorable Court for leave to file the annexed brief as *Amicus Curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. Consent to the filing of the brief has been given on behalf of Petitioners. Consent to the filing of the brief was sought from, but not granted by Respondent Berisford Metals Corporation.

American President Lines, Ltd. is a United States corporation whose principal business is the operation of a containerized transportation system. As part of this system, APL owns and operates some eighteen U.S. Flag vessels specifically designed for the carriage of containers and containerized cargo, the largest being capable of carrying 2,500 twenty-foot containers at one time.

APL's principal service in which these vessels operate is between the west coast of the United States and the Far East. APL also services ports in south and west Asia by means of feeder vessels. APL services some twenty-seven sea ports in the Far East and south and west Asia ranging from Kuwait to Yokohama. The principal sea ports serviced on the west coast of the United States are Seattle, Oakland and San Pedro. It also services Dutch Harbor and Guam.

It provides a comprehensive system of transportation which includes service from and/or to some 461 cities in the United States and 134 foreign cities. As part of the transportation service offered, transportation of containerized cargo utilizes not only ocean carriage, but also overland rail transportation in the United States and localized transportation by rail or truck.

In conjunction with its container service, APL owns or leases approximately 35,700 containers and, in the course of its operations in 1985, moved some 158,000 FEUs[1] from Far East and Asian ports and some 123,000 FEUs to such ports.

In this case, the Court of Appeals for the Second Circuit precluded the ocean carrier from limiting its liability pursuant to the bill of lading contract which called for the application of Section 4(5) of the United States Carriage of Goods By Sea Act, 46 U.S.C. § 1304(5). The Court refused to limit the ocean carrier's liability on the basis that the bill of lading "erroneously" stated that certain goods had been loaded on board the vessel.

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1 "Forty Foot Equivalent Unit"; essentially a forty foot container.

The Second Circuit Court of Appeals stated the carrier, having loaded bundles of ingots into containers, was:

> ". . . thereafter responsible for verifying the contents before loading the containers and issuing a clean on-board bill of lading . . . Even if opening of the containers posed difficulties, at the very least the carrier owed a duty to verify the weight of the containers at shipside before they were placed aboard its ship . . ." (Petitioner's Appendix, pg. 16(a).)

APL receives and transports containerized cargo which is submitted to it in various forms. It transports containers which are loaded at in-land locations by shippers and delivered to it in a loaded and sealed condition for ultimate delivery to consignees overseas. It also receives shipments to be placed in containers for carriage and delivery overseas. Frequently, it receives loaded and sealed containers which have been consolidated by "NVOCCs".[2] Usually, the NVOCC issues its own bill of lading for the individual shipments which it consolidates and containerizes. APL will issue a bill of lading the NVOCC who acts essentially as a shipper vis-a-vis APL.

The bills of lading are generally prepared by the shipper's freight forwarder and submitted to APL for execution. Likewise, this documentation is rarely accomplished, if ever, at shipside. The execution of bills of lading are usually accomplished in an office far removed from the terminal where the containers are loaded on board the vessel.

While the Court of Appeals for the Second Circuit pronounced a minimal "duty" for the carrier to verify the weight of a container at shipside, APL is not aware of any scales available at shipside at the ports which it services. At its sea terminals in the United States, Japan and Taiwan, scales are available; however, these are located at the entrance gate to the terminal, not at the loading berth. As to other ports, APL does

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2 "NVOCC"; Non vessel operating common carrier.

not control the use of any scales even available at the gate entrance. The cost of purchase and installation of a scale from which a certified weight could be taken is approximately $50,000.00 per scale.

The time which would be involved to drop weigh[3] a container would usually require a minimum of 15/20 minutes with two men involved.

APL expresses great concern as to the negative impact which the decision of the Court of Appeals for the Second Circuit will have on the speedy, economic and efficient employment of containers as a means of ocean/multimodal transportation which has been the key and essential purpose in the development of container vessels and containerized operations and which brings advantages to both cargo interests and container carrying operators.

It is respectfully submitted that the decision below did not consider this impact, but viewed the facts involved essentially under the practices of yesteryear when individual break-bulk cases, casks or cartons were received at shipside, tallied and documentation issued almost simultaneously with loading.

APL earnestly submits that it is most appropriate, indeed essential, that this Court grant the Petition to enable consideration of the overall aspects of the decision with respect to containerized transportation and, in this regard, APL respectfully requests leave to file the annexed brief.

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3 Placing the container and its carrying chassis on the scale, releasing the prime mover and then ascertaining the tare value of the container and chassis to obtain the net weight of cargo.

Dated: New York, New York
May 22, 1986

Respectfully submitted,

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BRIEF OF AMICUS CURIAE AMERICAN PRESIDENT LINES, LTD.

Statement of Interest of American President Lines, Ltd.

American President Lines, Ltd. is a United States Corporation whose principal business is the operation of a containerized transportation system. It owns and operates some eighteen U.S. Flag vessels specifically designed for the carriage of containers and containerized cargo and operates these vessels principally between the west coast of the United States and the Far East. In conjunction with this service, it services some twenty-seven seaports in the Far East and south and west Asia with three principal seaports serviced on the west coast of the United States. Its transportation system includes service from and/or to some 461 cities in the United States and some 134 cities in foreign countries.

American President Lines, Ltd. has a significant investment in furnishing modern containerized equipment in an effort to afford an efficient and economic system of transportation involving the use of containers for the transportation of cargo. It is greatly concerned as to the negative impact which the decision of the Court of Appeals for the Second Circuit will have with respect to container transportation to the detriment of its system of container transportation, the cargo interests which it serves and container transportation as a whole.

ARGUMENT

Point I

The Decision Below Overlooks And Disregards The Practical Aspects Of Container Operation

The advent of container transportation was generated by a need for fast and efficient transportation of goods by means of containers (usually twenty or forty foot in length) in which cargo could be stowed and speedily handled and transported as a unit. The use of containers led to the design, building and employment of vessels specifically designed and intended to transport these containerized units, thus speeding the loading and discharge of cargo, minimizing the handling of individual packages or units and reducing the exposure to damage as a result. In conjunction with this streamlining, carrying vessels were more effectively utilized by virtue of faster turn-around time in port. Containerized cargoes are efficiently transferred from one mode of transportation to another which has generated the offering of a multimodal or comprehensive scheme of transportation with the resulting benefits to both container transportation operators and the cargo interests which utilize them.

In the decision below, the Court of Appeals for the Second Circuit disallowed the ocean carrier the benefit of its contractual limitation on the basis that the ocean carrier had erro-

neously stated the goods were on board the vessel, indicating that the ocean carrier, if it could not open the containers to count the cargo, at least had the duty to verify the weight of the containers at the vessel's side before they were loaded on board.

Aside from the fact that scales are not usually available shipside, even the requirement to weigh each container would destroy the effectiveness of container operation.

To weigh each individual container prior to loading of only 250 containers (20% of the forty foot carrying capacity of APL's largest container carrier) would involve some three and a half days of *straight through work* plus the attendant cost of labor which would necessarily be involved. It is not unusual for container vessels to spend no more than a day or two, *without overtime*, for turn-around time under present operations where containers are not weighed prior to loading on board.

Aside from the limited, if non-existent, availability of scales at shipside, to fasten such an obligation on a container operator in order for it to avoid the risk of being stripped of its contractual or statutory defenses would involve investments of astronomical proportion for the installation of scales, even if such were physically possible.

It is respectfully submitted that the reasoning of the Court below is neither commercially feasible nor practical. On the contrary, the ramifications of the obligation which the Court below would place upon container operators effectively would destroy the accepted scheme and purpose of container transportation.

To require the verification which the Court below speaks of would do away with the prompt and cost-efficient scheme which container transportation affords and can only have a serious negative impact on the commerce of the United States, which involves the importers and exporters who ship cargo as well as the container operators who carry that cargo.

Point II

The Decision Below Represents An Apparent Conflict Between The Circuits And Within The Second Circuit Itself

The Court below relied heavily on its prior decision in *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 27 F.2d 129 (2d Cir. 1928) *aff'd* after remand, 47 F.2d 878 (2d Cir.), *cert. denied*, 283 U.S. 856 (1931) which equated the facts considered by it to deviation or "quasi-deviation", regardless of what terminology may have been used. The Court in that case referred to deviation in the voyage or stowage of cargo on deck. It also went on to refer to *misdelivery* of goods as constituting essentially the same type of "breach".

Contrast that holding with the most recent decision by the Second Circuit in *B.M.A. Industries, Ltd. v. Nigerian Starline, Ltd.*, Nos. 85-7864, 7922, slip op. (2d Cir., March 19, 1986) where the Court, while considering the misdelivery of an entire cargo, allowed the ocean carrier the benefit of its package limitation. See also, *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhauser*, 507 F.2d 68 (2d Cir. 1974) where the same Court allowed a package limitation, refusing to extend the principle of "quasi-deviation" in a case where the ocean carrier furnished an obviously unseaworthy ship.

In contrast to the approach by the Court of Appeals for the Second Circuit that deviation or "quasi-deviation" precludes the carrier from asserting its bill of lading defenses or the package limitation defense of COGSA, the Seventh Circuit in *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt*, 313 F.2d 872 (7th Cir. 1963) had no difficulty in applying the clear meaning of the words of COGSA that "in any event" the carrier would be entitled to the package limitation unless a higher value was delcared, in spite of a deviation. See also the case of, *A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd.*, 199 F.2d 134 (4th Cir. 1952) where the Fourth Circuit held a carrier was not deprived of its right to exoneration under the fire provision of the Carriage of Goods by Sea Act even

though the cargo in question had been stowed on deck under clean bills of lading which the Court considered to be a "deviation".

The Court below also found support in its previous decision of *Elgie & Co. v. S.S. S.A. Nederburg*, 599 F.2d 1177 (2d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980) which involved a shipment outbound from the United States. Essentially, the decision below is the obverse of *Nederburg*, *supra*.

While the Court below acknowledged that the shipment in *Nederburg*, *supra,* was governed by the Pomerene Act, 49 U.S.C. § 81 et seq., which does not contain a limitation of liability provision, and pointed out that the Court in *Nederburg* referred to "established doctrines of admiralty law", the Court apparently overlooked the holding of this Court in *Leigh Ellis & Co. v. Davis*, 260 U.S. 682 (1923).

The suit in that case involved failure to deliver the full amount of cotton covered by two bills of lading. The District Court dismissed the matter on the ground that the suit was not timely under the provisions of the contract, and also on the merits, *Leigh Ellis & Co. v. Payne*, 274 Fed. 443 (N.D. Ga. 1921). The Circuit Court of Appeals affirmed the judgment, adopting the opinion below as to time bar, *Leigh Ellis & Co. v. Davis*, 276 Fed. 400 (5th Cir. 1921). The Federal Bills of Lading Act (the Pomerene Act) was applicable, *Leigh Ellis & Co. v. Payne*, 274 Fed. at 445.

The plaintiff in error asserted to this Court:

> "The suit here is not for a failure to deliver property received by a carrier, but for the wrong of the carrier in issuing a false bill of lading." *Leigh Ellis & Co. v. Davis, supra*, at page 685.

This Court upheld the contractual provision with respect to the commencement of suit time stating:

> "We find it unnecessary to consider other defenses besides the contract limitation, as we agree with the Courts below

that that disposes of the case." *Leigh Ellis & Co. v. Davis, supra*, at page 688.

See also, *Steven-Scott Grain Co. v. Chicago, R.I. & P. Ry. Co.*, 221 P. 1117 (Supreme Ct. of Kansas, 1924).

In *Leigh Ellis & Co. v. Davis, supra*, this Court enforced a contractual provision in spite of the assertion that the carrier had issued a false bill of lading. It is respectfully submitted that the decision below stands as contrary to this reasoning.

It may be one thing to preclude an ocean carrier from denying receipt or loading of cargo as stated in its bill of lading as an evidentiary matter. It is quite another to disregard the contract in its entirety.

With respect to the reservation in COGSA preserving the Pomerene Act, see the statement of A. B. Barber before the United States Senate Committee on Commerce, May 10, 1935, Hearing on Carriage of Goods by Sea, at page 27:

> "The Chairman: Is this bill in a sense substituted for the Pomerene Bill?
>
> "Mr. Barber: No, Sir it is not.
>
> "The Chairman: It supplements it?
>
> "Mr. Barber: Yes; it supplements it.
>
> "The Chairman: This bill does not seek to repeal the Pomerene Act?
>
> "Mr. Barber: No; it does not. We have to preserve the Pomerene Act in certain particulars, the most significant one being that the signature of the carrier that he has the goods is *conclusive evidence* of the receipt of the goods. Our proposed amendment would preserve the Pomerene Bills of Lading Act in that respect because very serious abuses had arisen before the enactment of the Pomerene Act, and those abuses would be permitted again, if that feature of the Pomerene Act were eliminated. So it is the purpose of our amendment to preserve the Pomerene Act in that particular." (Emphasis supplied.)

Point III

International Commercial Regimes Recognize The Viability of Defenses, Save In Cases Where The Carrier Acts With "Abandon"

> "Neither the Carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result." Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Feb. 23, 1968, 6 Benedict on Admiralty Doc. 1-2, 1-27.

Article 25 of the Warsaw Convention, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, applicable to international air carriage, contains a similar provision: "If the damage is caused by the carrier's willful misconduct" or by such default on his part as would be considered equivalent to willful misconduct he would not be entitled to the benefit of provisions excluding or limiting his liability.

The United Nations Convention on International Multimodal Transport of Goods, May 24, 1980, 6 Benedict on Admiralty, Doc. 1-4, at 1-58-82, contains a similar provision in Article 21. See also, Rule 17 of the Uniform Rules for a Combined Transport Document published by the International Chamber of Commerce, Doc. 298.

It is respectfully submitted that this approach is one of commercial practicality and reasonableness. Sanction is provided for only in the case of recklessness or willful misconduct, while the decision below far exceeds such a realistic and commerical approach.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals should be granted as prayed for.

Respectfully submitted,

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